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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RODOLFO TELLO GARZA,

Defendant and Appellant.

F044404

(Super. Ct. No. MCR15934)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Madera County. Edward P. Moffat, Judge.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Vartabedian, Acting P.J., Harris, J., and Buckley, J.

Appellant, Rodolfo Tello Garza, pled guilty to one felony count of corporal punishment on a child resulting in a traumatic condition (Pen. Code, § 273d, subd. (a)) on August 26, 2003.<sup>1</sup> Garza admitted a prior serious felony conviction within the meaning of the three strikes law. On September 24, 2003, the court sentenced Garza to the four-year midterm which it doubled to eight years pursuant to three strikes.

On appeal, Garza contends there was substantial evidence he suffered from a developmental disability and that the trial court had a sua sponte duty to evaluate his competency pursuant to section 1368 and failed to do so. Garza also contends his trial counsel was incompetent.

### **FACTS**

On July 16, 2003, Officer Major of the Madera Police Department was dispatched to a residence to investigate an incident of child abuse.<sup>2</sup> When Major arrived at the residence, she saw the six-year-old victim with an oval shaped welt that covered the width of his back. The child told Major Garza hit him because he accidentally broke Garza's sunglasses. The child's mother confirmed that Garza hit her child across the back with his belt. Major contacted a neighbor who reported she heard loud screaming from the apartment next door and saw Garza behind the child with a black, folded belt in his hand. The neighbor contacted the police department.

At the preliminary hearing scheduled on August 1, 2003, defense counsel indicated Garza had "mental issues." The court replied it was obvious there could be some issues and granted a continuance for the preliminary hearing. The case was continued again on August 15, 2003, because defense counsel was unsure whether the prosecution's offer was conveyed to Garza. On August 26, 2003, Garza withdrew his not

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The facts are derived from the probation report.

guilty plea and admitted the allegation as well as the prior serious felony allegation. Garza indicated he understood the consequences of his plea. No mention was made of Garza's competency.

The probation report indicated Garza is disabled and receives social security benefits. At the sentencing hearing, Susan Gorthy, Garza's Independent Living Specialist with the Central Valley Regional Center, represented she was Garza's case worker and that Garza was developmentally disabled. Gorthy requested Garza not be placed in an independent living situation but that he be placed into a group home. The court explained that Garza was ineligible for probation and was being sentenced to prison. Gorthy made no other representations to the court.

The trial court noted the probation officer ignored the fact that Garza has a developmental disability. The court stated that it was "a mental condition not amounting to a defense." Neither Garza nor his counsel asserted he was unable to understand the proceedings or to assist with his defense.

### **DISCUSSION**

Garza contends he was mentally incompetent to stand trial and that he was entitled to a hearing pursuant to section 1368. Garza also contends his trial counsel was incompetent.

Once the accused has come forward with substantial evidence of incompetence to stand trial, due process requires a full competence hearing as a matter of right. The trial court has no discretion to exercise. Substantial evidence of incompetence is sufficient to require a full hearing even if the evidence is in conflict. Where the substantial evidence test is satisfied and a full competence hearing is required but not held by the trial court, the judgment must be reversed. Substantial evidence is evidence that raises a reasonable doubt concerning the defendant's competence to stand trial. If a psychiatrist or qualified psychologist, who has had sufficient opportunity to examine the accused, states under oath with particularity that in his or her professional opinion the accused is, because of

mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken or is incapable of assisting in his or her defense or cooperating with counsel, the substantial evidence test is satisfied. (*People v. Welch* (1999) 20 Cal.4th 701, 738.)

The problem with Garza's assertion of incompetency is that there was no evidence before the trial court that his developmental disability amounted to actual incompetency. There is no indication in the appellate record that Garza failed to understand the nature of the proceedings or that he was unable to assist his counsel. There was no factual basis upon which the trial court would have been on notice that it was necessary to suspend the proceedings pursuant to section 1368.

#### **DISPOSITION**

The judgment is affirmed.<sup>3</sup>

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<sup>3</sup> We note that Garza has filed a writ petition with this court, case No. F045846. Our holding in the instant action is without prejudice to any assertions Garza has raised in the writ petition.